

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 07-O-10980-RAH (07-O-11008;
)	07-O-11015; 07-O-11205;
)	07-O-11335; 07-O-11403;
RICHARD ALAN BRUBAKER,)	07-O-11972; 07-O-12243)
Member No. 134130,)	
)	
)	DECISION AND ORDER SEALING
A Member of the State Bar.)	CERTAIN DOCUMENTS

Introduction¹

In this original disciplinary proceeding, respondent RICHARD ALAN BRUBAKER² was accepted for participation in and has successfully completed the State Bar Court's Alternative Discipline Program (ADP). Accordingly, the court recommends below that respondent be placed on two years' stayed suspension and two years' probation on conditions, including a nine-month suspension with credit given for the period during which respondent was involuntarily enrolled as an inactive member of the State Bar of California under section 6233.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code unless otherwise indicated.

² Respondent was admitted to the practice of law in this state on June 14, 1988, and has been a member of the State Bar of California since that time. He has no prior record of discipline.

Pertinent Procedural History

Respondent's Acceptance into the ADP

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed the notice of disciplinary charges (NDC) in this case on March 24, 2010. Respondent filed his response to the NDC on April 28, 2010.

In an order filed on May 7, 2010, State Bar Court Judge Donald F. Miles referred the case to the ADP for an evaluation of respondent's eligibility for participation in that program.

Thereafter, on June 1, 2010, respondent submitted, to the State Bar Court, a copy of his initial LAP Participation Plan.

On July 1, 2010, respondent submitted, to the court, a Nexus Statement, which respondent executed under penalty of perjury. Respondent's Nexus Statement establishes the existence of a nexus between respondent's substance abuse issues and the found misconduct in this case.

On August 2, 2010, the State Bar and respondent submitted separate briefs on the issue of discipline. Moreover, the State Bar and respondent entered into a Stipulation Regarding Facts and Conclusions of Law (Stipulation), which the court approved in an order that was filed on October 5, 2010. The Stipulation sets forth the agreed-upon factual findings, legal conclusions, and mitigating and aggravating circumstances in this case.

Also, on October 5, 2010, the court lodged a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement) in which the court set forth (1) the level of discipline that the court will recommend to the Supreme Court if respondent successfully completes the ADP and (2) the level of discipline that the court will recommend if respondent does not successfully complete the ADP. Also, on October 5, 2010, respondent signed a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program

(Contract). Also, on October 5, 2010, the court filed an order accepting respondent into the ADP beginning on October 5, 2010.

Respondent's Completion of the ADP

In accordance with this court's June 18, 2010 order,³ respondent was involuntarily enrolled as an inactive member of the State Bar of California beginning on June 18, 2010. (§ 6233.) Respondent thereafter continuously remained inactive under the court's June 18, 2010 order until April 29, 2011, which was more than 10 months. On April 29, 2011, the court filed an order in which it (1) found that respondent had established his rehabilitation, present fitness to practice, and present learning and ability in the general law (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii))⁴ and (2) ordered that respondent's involuntary inactive enrollment terminate on April 29, 2011.

On March 30, 2011, respondent submitted, to the court, a LAP Certificate of One Year of Participation in the Lawyer Assistance Program – Substance Use, certifying that the LAP is not aware of respondent's use of any unauthorized substances for at least one year before March 18, 2011.

On June 2, 2011, the court received a copy of a February 28, 2011 letter from LAP Director Janis Thibault to respondent congratulating respondent on his February 28, 2011 successful completion of the LAP (substance abuse).

³ On October 5, 2010, the court filed an order supplementing its June 18, 2010 order and requiring, among other things, that respondent provide notice of his involuntary inactive enrollment and his consequent disqualification to act as an attorney to his clients; any co-counsel; opposing counsel or, if no opposing counsel, opposing parties; and the agencies, courts, and tribunals before which respondent then represented clients. Respondent thereafter complied with the requirements of the court's October 5, 2010 order.

⁴ All further references to standards are to this source.

On June 6, 2011, the LAP sent a letter to the court recommending that respondent be required to undertake five specified steps to sustain his recovery from substance abuse following his February 28, 2011 successful completion of the LAP. The court received that June 6, 2011 letter on June 8, 2011, and thereafter, directed respondent to undertake the recommended steps and to report his compliance (or noncompliance) with those steps to the court and the State Bar on a quarterly basis. As directed, respondent performed and reported his compliance with the five steps.

On April 5, 2012, the court filed an order in which it found that respondent successfully completed the ADP, and the case was taken under submission for decision on April 13, 2012, upon the State Bar's filing of the ADP graduation checklist.

Findings of Fact and Conclusions of Law

The court adopts the facts and conclusions of law set forth in the Stipulation as the court's findings of fact and conclusions of law.⁵ Briefly, those facts and conclusions establish respondent's culpability for the following 26 ethical violations in eight different client matters and the following aggravating and mitigating circumstances.

Misconduct

Case Number 07-O-10980

In case number 07-O-10980, respondent stipulated that, during his representation of Nancy Diaz, that he (1) failed to maintain \$2,333 he held in trust for Diaz in his client trust account in willful violation of rule 4-100(A); (2) failed to promptly remit that same \$2,333 to Diaz as she requested in willful violation of rule 4-100(B)(4); (3) intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by

⁵ A copy of the Stipulation is attached to this decision and incorporated by reference as if it were fully set forth herein.

failing to adequately supervise a member of his office staff; and (4) failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide written responses to two letters about the Diaz matter that respondent received from a State Bar investigator.

Case Number 07-O-11008

In case number 07-O-11008, respondent stipulated that, during his representation of James Curtis, he intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by: (1) failing to appear at a mandatory settlement conference in Curtis's lawsuit, allowing Curtis's lawsuit to be dismissed; (2) failing to appear at the hearing on a motion that respondent filed to set aside the dismissal of Curtis's lawsuit; and (3) failing to re-file the motion to set aside the dismissal or to seek any other relief for Curtis.

Respondent further stipulated in case number 07-O-11008 that he failed to adequately communicate with Curtis in willful violation of section 6068, subdivision (m) by failing: (1) to inform Curtis that he did not attend the hearing on the motion to set aside the dismissal, that the superior court therefore took the motion to set aside the dismissal "off calendar," and that the superior court never reinstated Curtis's lawsuit; and (2) to promptly respond to Curtis's telephone calls and letter.

Respondent further stipulated that he failed to account to Curtis for more than \$3,900 in insurance proceeds that respondent held in trust for Curtis in willful violation of rule 4-100(B)(3) and that he failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide written responses to two letters about Curtis's lawsuit that respondent received from a State Bar investigator.

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Case Number 07-O-11015

In case number 07-O-11015, respondent stipulated that, during his representation of Dana Jimenez, he intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by failing to appear at a case management conference in Jimenez's lawsuit, failing to appear at the hearing on an order to show cause in Jimenez's lawsuit, allowing Jimenez's lawsuit to be dismissed, and failing to file a motion to set aside the dismissal of Jimenez's lawsuit.

Respondent further stipulated that he failed to adequately communicate with Jimenez in willful violation of section 6068, subdivision (m) by failing to inform Jimenez that the superior court had dismissed her lawsuit and by failing to respond to Jimenez's telephone calls.

Respondent further stipulated that he failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide written responses to two letters regarding the Jimenez's lawsuit that respondent received from a State Bar investigator.

Case Number 07-O-11205

In case number 07-O-11205, respondent stipulated that, during his representation of Robert Jamison, he: (1) intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by failing to perform any legal services for Jamison; (2) failed to adequately communicate with Jamison in willful violation of section 6068, subdivision (m) by failing to respond to Jamison's telephone messages between May 2006 and October 2006; (3) failed to release Jamison's client file as requested upon the termination of his employment in willful violation of rule 3-700(D)(1); and (4) failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide written responses to two letters regarding the Jamison matter that respondent received from a State Bar investigator.

Case Number 07-O-11335

In case number 07-O-11335, respondent stipulated that, during his representation of Roberto Martinez and the Estate of Roberto Martinez (collectively “Martinez”), he intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by failing to perform any legal services for Martinez after March 3, 2006; failing to appear at a case management conference in Martinez’s lawsuit; failing to appear at a mandatory settlement conference in that lawsuit; failing to appear at the hearing on an order to show cause in the lawsuit; allowing Martinez’s lawsuit to be dismissed; and failing to file a motion to set aside the dismissal or seek any other relief for Martinez.

In addition, respondent stipulated that he failed to adequately communicate with Martinez in willful violation of section 6068, subdivision (m) by failing to inform the executor of Martinez’s estate that Martinez’s lawsuit had been dismissed and by failing to respond to a letter that respondent received from the executor of Martinez’s estate. Furthermore, respondent stipulated that he failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide written responses to two letters regarding the Martinez matter that respondent received from a State Bar investigator.

Case Number 07-O-11403

In case number 07-O-11403, respondent stipulated that, during his representation of Ophelia Longoria, he intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by failing to file a lawsuit for Longoria; failed to provide Longoria with an accounting for \$25,000 that respondent held in trust for her in willful violation of rule 4-100(B)(3); and failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide written responses to two letters regarding the Longoria matter that respondent received from a State Bar investigator.

Case Number 07-O-11972

In case number 07-O-11972, respondent stipulated that, during his representation of Alicia Elipinali, he intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by failing to file a lawsuit for Elipinali and that he failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide a written response to a letter regarding the Elipinali matter that respondent received from a State Bar investigator.

Case Number 07-O-12243

In case number 07-O-12243, respondent stipulated that, during his representation of Edward Reiff, he intentionally, recklessly, or repeatedly failed to competently perform legal services in willful violation of rule 3-110(A) by failing to file a proof of service of the complaint in Reiff's lawsuit; failing to appear at the hearing on an order to show cause issued in Reiff's lawsuit; allowing Reiff's lawsuit to be dismissed; and failing to file a motion to set aside that dismissal or seek any other relief from the dismissal for Reiff.

Respondent further stipulated that he failed to adequately communicate with Reiff in willful violation of section 6068, subdivision (m) by failing to respond to Reiff's telephone call and letter and by failing to inform Reiff that his lawsuit had been dismissed.

Respondent further stipulated that he failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide a written response to a letter regarding the Reiff matter that respondent received from a State Bar investigator.

Aggravation

In aggravation, respondent's misconduct evidences multiple acts of misconduct.

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Mitigation

In mitigation, respondent has no prior record of discipline in 22 years of practice and cooperated with the State Bar. In addition, as noted above, respondent successfully completed the ADP on April 5, 2012. Respondent's successful completion of the ADP required his successful participation in the LAP, and respondent has successfully completed the LAP. Moreover, as noted above, this court was presented with a Certificate of One Year of Participation in the Lawyer Assistance Program – Substance Use, which is strong evidence of respondent's abstinence from substance use for one year, as are respondent's post-LAP activities as reported by respondent. In short, the record contains clear and convincing evidence that respondent no longer suffers from the substance abuse issues that led to his misconduct. Accordingly, respondent is entitled to significant mitigation for his successful completion of the ADP and the LAP.

DECISION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but rather, to protect the public, to preserve public confidence in the legal profession, and to maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

To determine the appropriate level of discipline, the court reviewed and considered: (1) respondent's and the State Bar's briefs on the issue of discipline; (2) the Stipulation (which sets forth the facts, conclusions of law and aggravating and mitigating circumstances); (3) the standards; (4) respondent's Nexus Statement regarding the nexus between respondent's mental health issues and his misconduct, and (5) the Confidential Statement, which advised the parties of the discipline that the court would recommend if respondent successfully completed the ADP and if respondent failed to successfully complete the ADP. In determining the appropriate

discipline to recommend if respondent successfully completed the ADP, the court considered the discipline recommended by the parties, the standards, and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 2.2(b), 2.4, and 2.6 and *Pineda v. State Bar* (1989) 49 Cal.3d 753; *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071; *Hawes v. State Bar* (1990) 51 Cal.3d 587; *Frazer v. State Bar* (1987) 43 Cal.3d 564; *Chefsky v. State Bar* (1984) 36 Cal.3d 116 and *Chasteen v. State Bar* (1985) 40 Cal.3d 586.

After agreeing to the discipline which the court would recommend to the Supreme Court if respondent successfully completed or if he failed to successfully complete the ADP, respondent executed the Contract to participate in the ADP and began his period of participation in the ADP. Respondent thereafter participated in and successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the court's Confidential Statement if respondent successfully completed the ADP.

The Confidential Statement provides that respondent should be required to establish his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii) before his nine-month suspension is terminated. However, this court does not recommend that respondent be required to comply with standard 1.4(c)(ii) because respondent made the requisite showing under that standard before the court terminated his involuntary inactive enrollment under section 6233 on April 29, 2011.

In addition, the Confidential Statement provides that respondent should be required to give notice of his nine-month suspension in accordance with California Rules of Court, rule 9.20. However, this court does not recommend that respondent be required to comply with rule 9.20. If the Supreme Court adopts this court's recommendation and gives respondent credit for his nine-month inactive enrollment under section 6233 towards this court's recommended nine-

month suspension, respondent will not be actually suspended from the practice of law and rule 9.20 will no longer be applicable in this proceeding.

Discipline Recommendation

The court recommends that respondent **Richard Alan Brubaker**, State Bar Number 134130, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of two years subject to the following conditions:

1. Brubaker is suspended from the practice of law for the first nine months of probation (with credit given for inactive enrollment, which was effective June 18, 2010, through April 28, 2011 (Bus. & Prof. Code, § 6233)).
2. Brubaker must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California.
3. Within 10 days of any change, Brubaker must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
4. Within 30 days after the effective date of discipline, Brubaker must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. At the direction of the Office of Probation, Brubaker must meet with the probation deputy either in person or by telephone. Brubaker must promptly meet with the probation deputy as directed and requested.
5. Brubaker must submit written quarterly reports to the Office of Probation no later than each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Brubaker must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Brubaker must also state whether there are any proceedings pending against him in the State Bar Court and, if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the period of probation and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, Brubaker must answer fully, promptly and truthfully, any inquiries of the Office of Probation which are directed to him

personally or in writing relating to whether he is complying or has complied with the probation conditions.⁶

7. The two-year probation will begin on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.) And, at the expiration of the period of probation, if Brubaker has complied with all the terms of probation, the order of the Supreme Court suspending him from the practice of law for two years will be satisfied and that suspension will be terminated.

No Professional Responsibility Examination

The court does not recommend that **Richard Alan Brubaker** be ordered to take and pass a professional responsibility examination because he took and passed the Multistate Professional Responsibility Examination during his participation in the State Bar Court's Alternative Discipline Program.

Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10; that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment; and that the costs be paid with **Richard Alan Brubaker's** bar membership fees for the year 2013. If he fails to pay costs as described, or as may be modified by the State Bar Court, costs are due and payable immediately.

Direction Re Decision and Order Sealing Certain Documents

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 5.388(C) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 of the Rules of Procedure.

⁶ The court will not recommend that respondent provide proof of his attendance at Ethics School as set forth in the Confidential Statement as respondent complied with this requirement during the period of his ADP participation.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosures. All persons to whom protected material is disclosed must be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: June ___, 2012.

RICHARD A. HONN
Judge of the State Bar Court